TO: Sen. Terry B. Gerratana and Sen. Matthew Ritter, Chairmen,
And Honorary Members of the Public Health Committee

Testimony from Rivers Alliance of Connecticut
Public Hearing, February 24, 2016, on
RB 5263 AAC The Department Of Public Health's Recommendations
On Disclosure of Water Plan Information

Rivers Alliance of Connecticut is a statewide non-profit organization, founded in 1992, as a coalition of river organizations, other conservation non-profits, individuals, and businesses working to protect and enhance Connecticut's rivers, streams, aquifers, lakes, and estuaries. We promote sound water policies and water stewardship through education and assistance at the local, regional, and state levels.

Thank you for the opportunity to remark on this bill. It addresses a problem concerning availability of water-data information, a problem that has been recognized in Water Planning Council discussions for approximately ten years, and that now is a serious barrier to crafting a comprehensive state water plan as mandated in PA 14-163. RB 5263 is a serious and welcome effort to lower that barrier but falls short of making available most of the critical the information needed for water planning at the local, regional, and state levels.

Background

Following the Al Qaeda terrorist attacks in the U.S. in 2001, all branches of government, corporations, and individuals became highly security conscious. Thousands of new precautions and procedures were rapidly adopted. It was difficult for years to sort out which precautions were prudent and which futile or actually counterproductive. The nation is still struggling with those issues.

In Connecticut, water companies acted more rapidly and forcefully than other public and private entities to seek exemptions from the Freedom of Information Act (FOIA) that would allow them to withhold a large volume of information about their capacities and operations. They advocated successfully for the passage of three security laws in 2002 and 2003. The first was a fairly straightforward anti-sabotage law, the second went further, and the third, passed in a budget implementer, allowed public utilities to withhold from residents and public officials information regarding location and size of reservoirs, interconnections with other water companies,, location and capacities of well fields, plans for future sources, boundaries of water company lands, and so forth. These exemptions far exceed what is available to power utilities, and water companies are unique in that state security officials and state agencies cannot make a decision without consulting with the subject utility.

(See appendix at end of testimony for more details on the 2002-2003 laws.)

It quickly it became clear that most of this information could not really be kept secret. It is in fact widely available but so scattered as not to be useful to researchers or planners or watershed-protection advocates. By contrast, it is not difficult to find out a great deal about any given utility that might be a target. Meanwhile, the normal business of seeking permits, and funding, and new customers, and negotiating with municipalities cannot be done without using data that is not supposed to be available to the public.

So these security provisions are widely ignored, but they are still officially in effect, especially in the context of statewide water planning. For example, last year, the consultants seeking to work on state water utility regional planning were told they could have they information they would need but would have to sign confidentiality agreements and secure the various revelatory data from public view. I am attaching sample pages from a redacted water supply plan (for New Britain) to show the kind of material left in and the kind that is redacted, including material in the statement of Purpose and in the Executive Summary, plus reams of data. That was done in 2007, but the situation today is similar. Here below is material from a Water Utility Coordinating Committee (WUCC) plan posted on the DPH website. This is information that must be considered in creating the state water plan -- but we need to see it to consider it.

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TABLE 2-5

System Demand, Available Yield, and Margin of Safety for Community Water Systems S

Community Water System	Reference Year	Average Day Demand (gpd)	Average Day Available Yield [2] (gpd)	Average Day Margin of Safety	Maximum Month Demand (gpd)	Maximum Month Available Yield [2] (gpd)	Maximum Month Margin of Safety	Peak Day Demand (gpd)	Peak Day Available Yield [2] (gpd)	Peak Day Margin of Safety
[redacted]										
Spra[redacted]										

The Solution to Data Dilemma Proposed in 5263

The bill identifies the data that is presently redacted, much of which is important to planning. It then proposes that some of this information can be presented in summary form municipality by municipality. Here the language:

… documents or portions of documents that identify or describe procedures for sabotage prevention and response, and any plans, reports, technical specifications and other materials, including materials that contain the location of transmission mains and tunnels, source water intakes and treatment that include information that, if disclosed may result in a security risk to a water company, provided nothing in subparagraph (A)(ix) of this subdivision shall prohibit the disclosure of water quality reports, information concerning a water company's margin of safety and information concerning the amount of available water and safe daily yield that disclose only the municipality in which the source or sources of supply are located;

This appears to say that planners, non-profit waters stewards, and the general public still may not see the location of water mains, tunnels, etc. The closest they can come to seeing where reservoirs or wellfields are located is designation of the town. They can see some information concerning safe yield, available water (depends on condition of the infrastructure, which would not be public), and margin of safety (also dependent on the condition of the infrastructure), but cannot be told more about the location of this water other than the town it is in.

This is a step forward from total redaction. But it will not solve the state's water planning data needs as presently prominent in the news and in proposed legislation. When the CGA created the Water Planning Council in 2001, the motive was in part frustration with the water conflicts that were being brought to the Assembly to solve. Bills were introduced regarding the Shepaug River and Waterbury; the Mill River, the Regional Water Authority, and New Haven; a nonfunctioning water company in Brookfield, and so forth. When the CGA, in 2014, directed the Water Planning Council to develop a statewide plan, it was partly out of frustration with the controversy over the Metropolitan District Commission in Hartford should be the supplier to meet the new water needs of UConn in Storrs. The solution to these almost all other serious water supply and protection problems depends on a precise knowledge and understand of what water is where, what conservation and protection programs are needed, and what infrastructure exists or could be created to be sure that we are allocate and move water to protect the environment, the economy, and health. The public (including customers) should be able to see the data on which important water decisions are based.

Immediate Planning Dilemmas That Cannot Be Solved by 5263

Here are a few present controversies in the news and underlying at least three proposed bills.

In Bloomfield and neighboring towns, residents are loudly protesting the MDC project selling discount water to a new water-bottling plant in Bloomfield. (The bottles will be manufactured there, as well as filled and distributed.) Resident are asking whether MDC has enough water for this venture without running short in times drought. They want priority over the bottling plant if water is low. But is there actually any chance of MDC running low? The answers depend on the details of their systems, the quantities available, the infrastructures in place, the commitments they have made to other utilities and customers, their streamflow obligations, and so forth. MDC also says it is planning to truck in water from wells. What wells? Where? If it has enough water in its reservoirs, why use well fields? And why not release some water downstream to the parched small rivers below? MDC is open with details of its system, but DPH would still be bound to keep much of this information secret if it is requested. Two bills have been introduced on this controversy.

An oddity of the FOI system for water security is that each utility can set its own standard. For example, in Groton there is no apparent security risk in the full online descriptions of its water utility, but in Wallingford the same kind of information is treated as top secret,

In connection with the Kinder-Morgan/Tennessee Gas Pipeline project in MDC Class I and II reservoir lands in West Hartford, Rivers Alliance is researching whether the TGP facility for pig launching and receiving (an exciting concept) is dangerously close to the MDC treatment plant for these reservoirs. Normally, one cannot advocate for the safety of a treatment plant without knowing where it is.

Oxford just rejected part of deal with Towantic energy for a new plant on the Naugatuck. For Rivers Alliance and our Pomperaug River colleagues (and two members of the Siting Council), the most pressing question is whether there is enough cooling water available for the facility as planned. The water is to be supplied by the Heritage Water Company in Southbury. Heritage said it couldn't discuss its resources in detail in public (Board of Selectmen's meeting), but that, if more water was needed, it has a contract to buy water out-of-basin from Connecticut Water Ciompany. However, that contract is due to expire. Meanwhile two rivers in the watershed were at flows so low all summer that aquatic life was harmed. So if one wanted to make a plan for water allocation in this region, there would be many details one would need on the streams, the aquifers, Heritage's pumping, Towantic's needs, and so forth, And there would be high public interest in the discussion.

New Britain is interested in pursuing a proposal by Tilcon to excavate a reservoir using mostly Class I and II lands. This issue was brought to the Assembly in 2008 and is before you again in 2016. Any determination as to whether New Britain needs another reservoir, whether the pumping and redirection of water could be done so as to protect water quality, whether blasting would seriously disrupt hydrology in the region, and so forth, obviously depends on

working with myriad details of resource availability (from sources in several towns) and infrastructure capability.

Also in involving New Britain -- and Bristol -- Coppermine Creek ran bone dry this summer, just above a trout spawning area, which is also a DEEP Trout Management Area, There are six water diversion registrations in the recharge area of the Creek, divided between Bristol and New Britain. Who is drawing the stream dry? There are different theories, but one of the Bristol wells was restarted fairly recently, and is very close the river. The larger problem is that the total registered diversion rights (above 30 million gallons per day) far exceed the actual amount of water available. How can the stream be kept alive? This important little creek needs a survival plan. I do not see how that can be devised if the location of the wellfields can only be given as "in Bristol," and the condition of the infrastructure is a secret.

The Solution We Propose

Working with David Sutherland of The Nature Conservancy, we realized that the important thing is to be sure that planners and the public have the information necessary to solve planning problems fairly and wisely. At the least, the public should be able to understand and validate the data used by planners. Here is the language Mr. Sutherland crafted and that we fully support (along with the rest of his testimony).

… documents or portions of documents that identify or describe procedures for sabotage prevention and response, and any plans, reports, technical specifications and other materials**[**, including materials that contain the location of transmission mains and tunnels, source water intakes and treatment**]** that include information that, if disclosed **[**may**]** **WOULD LIKELY** result in a security risk to a water company, provided nothing in subparagraph (A)(ix) of this subdivision shall prohibit the disclosure of water quality reports, information concerning a water company's margin of safety and information concerning the amount of available water and safe daily yield **[**that disclose only the municipality in which the source or sources of supply are located**]** **THAT WOULD BE ESSENTIAL FOR PLANNING AND MANAGING WATER RESOURCES FOR THE ECONOMIC AND ENVIRONMENTAL BENEFIT OF AFFECTED COMMUNITIES**;

We believe that strong security is compatible with informed public understanding of water resources and a real opportunity to solve water problems prudently. With water, there is a risk that sweeping security laws will blind us to the risks and damage we ourselves are imposing on the state's extraordinarily valuable water resources.

Thank you for your consideration. We most certainly stand ready to answer questions or assist in framing a good result.

Margaret Miner, Executive Director, Rivers Alliance of Connecticut
Litchfield, CT

Appendix re FOIA water-security laws

The New Laws

PA 02-102

The first of the post-2001 security laws was *Public Act 02-102 An Act Concerning Water Supply Plans and Water Diversions.* This law amended Section 25-32d of the general statutes, which relates to the creation of water supply. It reads in relevant part.

> … (b) Any water supply plan submitted pursuant to this section shall evaluate the water supply needs in the service area of the water company submitting the plan and propose a strategy to meet such needs. The plan shall include: (1) A description of existing water supply systems; (2) an analysis of future water supply demands; (3) an assessment of alternative water supply sources which may include sources receiving sewage and sources located on state land; (4) contingency procedures for public drinking water supply emergencies, including emergencies concerning the contamination of water, the failure of a water supply system or the shortage of water; (5) a recommendation for new water system development; (6) a forecast of any future land sales, an identification which includes the acreage and location of any land proposed to be sold, sources of public water supply to be abandoned and any land owned by the company which it has designated, or plans to designate, as class III land; (7) provisions for strategic groundwater monitoring; **[**and**]** (8) an analysis of the impact of water conservation practices and a strategy for implementing supply and demand management measures; and (9) on and after January 1, 2004, an evaluation of source water protection measures for all sources of the water supply, based on the identification of critical lands to be protected and incompatible land use activities with the potential to contaminate a public drinking water source.
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> (c) For security and safety reasons, procedures for sabotage prevention and response shall be provided separately from the water supply plan as a confidential document to the Department of Public Health. Such procedures shall not be subject to disclosure under the Freedom of Information Act, as defined in section 1-200, as amended. Additionally, procedures for sabotage prevention and response that are established by municipally-owned water companies shall not be subject to disclosure under the Freedom of Information Act, as defined in section 1-200, as amended.
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> **[**(c)**]** (d) The Commissioner of Public Health, in consultation with the Commissioner of Environmental Protection and the Public Utilities Control Authority, shall adopt regulations in accordance with the provisions of chapter 54. Such regulations shall include a method for calculating safe yield, the contents of emergency contingency

plans and water conservation plans, the contents of an evaluation of source water protection measures, a process for approval, modification or rejection of plans submitted pursuant to this section, a schedule for submission of the plans and a mechanism for determining the completeness of the plan. ….

Rivers Alliance of Connecticut (RA), which has protested the subsequent security laws, supports this first law. It provides for security, but clearly does not contemplate withholding basic information; in fact, it calls for gathering new information. ***RA has maintained that this law, PA 02-102, should be the standard for security measures.***

PA 02-133

Next was *Public Act 02-133 An Act Concerning the Disclosure of Security Information under the Freedom of Information Act.* This extended to municipalities and to water utilities FOIA exemptions already accorded to the state. At the public hearing, the Connecticut Conference of Municipalities and the CWWA spoke in favor; no one spoke in opposition. Here is some of the language. Deletions are in brackets and new language is underlined.

"(19) Records **[**, the disclosure of which the Commissioner of Public Works or, in the case of records concerning Judicial Department facilities, the Chief Court Administrator, has**]** when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, any **[**state-owned**]** government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility, except that such records shall be disclosed to a law enforcement agency upon the request of the law enforcement agency. Such reasonable grounds shall be determined (A) with respect to records concerning any executive branch agency of the state or any municipal, district or regional agency, by the Commissioner of Public Works, after consultation with the chief executive officer of the agency; (B) with respect to records concerning Judicial Department facilities, by the Chief Court Administrator; and (C) with respect to records concerning the Legislative Department, by the executive director of the Joint Committee on Legislative Management. As used in this section, "government-owned or leased institution or facility" includes, but is not limited to, an institution or facility owned or leased by a public service company, as defined in section 16-1, as amended, a certified telecommunications provider, as defined in section 16-1, as amended, or a municipal utility that furnishes electric, gas or water service, but does not include an institution or facility owned or leased by the federal government, and "chief executive officer" includes, but is not limited to, an agency head, department head, executive director or chief executive officer. Such records **[**shall**]** include, but are not limited to:

[(A)**]** (i) Security manuals or reports; **[**, including emergency plans contained or referred to in such security manuals; **]**

[(B)**]** (ii) Engineering and architectural drawings of **[**state-owned**]** government-owned or leased institutions or facilities;

[(C)**]** (iii) Operational specifications of security systems utilized at any **[**state-owned**]** government-owned or leased institution or facility, except that a general description of any such security system and the cost and quality of such system, may be disclosed;

[(D)**]** (iv) Training manuals prepared for **[**state-owned**]** government-owned or leased institutions or facilities that describe, in any manner, security procedures, emergency plans or security equipment;

[(E)**]** (v) Internal security audits of **[**state-owned**]** government-owned or leased institutions or facilities;

[(F)**]** (vi) Minutes or **[**recordings**]** records of meetings**,** **[**of the Department of Public Works or the Judicial Department,**]** or portions of such minutes or **[**recordings**]** records, that contain or reveal information relating to security or other records otherwise exempt from disclosure under this subdivision; **[**and**]**

[(G)**]** (vii) Logs or other documents that contain information on the movement or assignment of security personnel at **[**state-owned**]** government-owned or leased institutions or facilities; and

(viii) Emergency plans and emergency recovery or response plans;

This law extends exemptions to matters beyond sabotage or enemy attacks. Any "safety risk" of any sort, including a risk of damage to any equipment or appurtenance, is grounds for withholding information. There need not be any risk to humans. In fact, the AG's office argued before the FOI Commission (FOIC) that, even if exercising the exemption would *increase* the risk to humans, the utility would still be able to use the exemption. These interpretations of the law were affirmed in FOIC decisions.

Under this law, the person responsible to decide what utility information should be disclosed is not required to have any security experience, but is required to consult with the head of whatever agency has received the FOI request. Most requests are to be forwarded to the Department of Public Works (DPW) because the statute was originally designed to thwart domestic prisoners who might be researching ways to escape from prison.

Some of the apparently small changes in this law mean major changes in the range of exemptions from FOI requirements. For example, the original statute provided for secrecy for portions of minutes from meetings of DPW or the Judiciary Department. The new law stretches this provision to *all* minutes of any public entity in the state. For example, if a water utility were to make a presentation to a local board of finance on the need for funding a new water main, that section of the minutes could be redacted because the locations and sizes of water mains are now subject to homeland-security secrecy rules.

In the original statute, emergency plans *in security manuals* could be kept secret. In the new law, *all* emergency plans and emergency-recovery-and response plans can be kept secret. This is stricter than federal law (FOIA, USC Section 552 Title 5), which says one cannot withhold emergency response plans from the public. Why? Because the federal government recognized that it is in the public interest to know whether or not utilities and other key industries have adequate response plans. We now know from experience that many such plans are completely inadequate. (BP's plans for dealing with an ocean spill off Louisiana called for rescuing walruses.)

Federal facilities are not covered in this statute.

PA 03-6

The most severe limitation on the public's right to know was effected in the 2003 budget implementor bill. (PA 03-6 passed in the summer special session.) Rivers Alliance attempted to negotiate more sunlight but without success, other than a letter of agreement with the CWWA that we would mutually try to resolve difficulties. So far there has been discussion but no results pursuant to this agreement.

The 2003 budget implementor law gave water companies a unique status under Connecticut FOI law.

First, it specifically allows them to claim secrecy rights for virtually all their records.

Second, the government is *required* to consult with a water company that wants to withhold information requested under FOIA. In all other cases, the government may, if it wishes, consult with the non-responding party; but such consultation is not required before a decision as to whether to release information. The reasoning behind the mandatory consultation was that people in DPW or the Department of Emergency Management and Homeland Security (DEMHS) might not know enough about the security appropriate to water utilities to make a sound decision on what should be released or kept secret.

Third, the law widened secrecy rights to include the records of private water companies submitted to public agencies, in addition to the exemptions previously given municipal utilities.

Here is the language specifically referencing the broad range of documents water companies can withhold from the public. Note that here and below references to water utilities have been changed to water companies. (Under prior law, if a private water company delivered a document to a state agency, it became a public document. This change ensured that documents from private companies would be accorded the same secrecy right as those from public utilities.)

(ix) With respect to a water company, as defined in section 25-32a, that provides water service: Vulnerability assessments and risk management plans, operational plans, portions of water supply plans submitted pursuant to section 25-32d that contain or reveal information the disclosure of which may result in a security risk to a water company, inspection

reports, technical specifications and other materials that depict or specifically describe critical water company operating facilities, collection and distribution systems or sources of supply;

Here's the language giving water companies special status with regard to consultation.

(d) Whenever a [state] public agency, except the Judicial Department or Legislative Department, receives a request from any person for disclosure of any records described in subdivision (19) of subsection (b) of this section under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Public Works of such request, in the manner prescribed by the commissioner, before complying with the request as required by the Freedom of Information Act and for information related to a water company. . . ,the public agency shall promptly notify the water company before complying with the request as required by the Freedom of Information Act. If the commissioner, after consultation with the chief executive officer of the applicable agency or after consultation with the chief executive officer of the applicable water company for information related to a water company believes the requested record is exempt from disclosure pursuant to subdivision (19) of subsection (b) of this section, the commissioner may direct the agency to withhold such record from such person.

The interesting innovation here is that the public agency that receives an FOI request re water supply must notify both DPW and the water company. DPW then apparently may consult with either the agency or the company (the language is ambiguous). In any case, DPW can follow the advice of one or the other (or neither) in deciding on the response to the request. Consensus is not required.

The most sweeping change was the inclusion of water supply plan as exempt documents.